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No. 95-1286

In the Supreme Court of the United States

OCTOBER TERM, 1995

PIETER BAKKER, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR HANSEN SAVINGS BANK, SLA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530

WILLIAM F. KROENER, III
General Counsel

ANN S. DUROSS
Assistant General Counsel

THOMAS L. HINDES
Senior Counsel

SHEILA KRAFT BUDOFF
Counsel
Federal Deposit Insurance Corporation
Washington, D.C. 20006

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QUESTIONS PRESENTED

1. Whether the dismissal of petitioners' appeal for failure to file a Rule 59 motion within ten days of the Resolution Trust Corporation's postjudgment removal of the state court action, as required by the court of appeals' earlier decision in *Jackson* v. *American Savings Mortgage Corp*, 924 F.2d 195 (11th Cir. 1991), was consistent with due process.

2. Whether establishment and application of a procedural rule, requiring compliance with Rule 59 after a post judgment removal, was a proper exercise of the court of appeals' supervisory powers.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5) is reported at 51 F.3d 242 (11th Cir. 1995). The opinion of the district court (Pet. App. 1) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 1995. A petition for rehearing was denied on November 20, 1995. Pet. App. 17. The petition for a writ of certiorari was filed on February 13, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arose from a contract dispute between petitioners, Pieter Bakker, Shirley Bakker, Pieter Bakker Marketing, Inc., and Pieter Bakker Management, Inc., and First Federal Savings and Loan of Hammonton, New Jersey,[1] involving petitioners' management and operation of a resort in Marathon, Florida, owned by subsidiaries of First Federal. In 1985, First Federal filed a claim against petitioners in state court for breach of contract. Petitioners counterclaimed, alleging various torts and breach of contract, and asserted third party claims against officers and employees of First Federal. Pet. App. 6.

After lengthy proceedings, including entry of partial summary judgments dismissing petitioners' tort and third party claims and several appeals in the state court system, the case was tried in 1991 before a jury on First Federal's complaint and petitioners' remaining counterclaim for breach of contract. The jury awarded First Federal $6,380.73 in damages, and awarded the petitioners $930,855.00 on their counterclaim. The trial judge set aside the jury's verdict on the counterclaim, granting First Federal's motion for judgment notwithstanding the verdict and, alternatively, First Federal's motion for new trial. Petitioners appealed to the Florida Third District Court of Appeal. Pet. App. 6.

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[1] During the pendency of the original state court action, First Federal was merged into Hansen Savings Bank, SLA, another financially troubled thrift, in a federally-assisted merger. For convenience, however, the parties have continued to refer to the plaintiff in the underlying action as First Federal, and we adopt that convention here.

2. During the pendency of petitioners' state court appeal, First Federal was declared insolvent by the Office of Thrift Supervision and the Resolution Trust Corporation (RTC) was appointed as receiver.[2] On April 15, 1992, the RTC filed a notice of substitution and simultaneously removed the case to federal district court pursuant to 12 U.S.C. 1441a(*l*)(3). On May 20, 1992, petitioners filed a motion to remand. That motion was denied on September 15, 1992. Pet. App. 7.

On September 29, 1992, 167 days after the removal and 14 days after their motion to remand was denied, petitioners filed a motion pursuant to Fed. R. Civ. P. 59 asking the district court to vacate the state court's judgment. The RTC opposed petitioners' Rule 59 motion as untimely and sought dismissal of this action based on petitioners' failure to file a Rule 59 motion within ten days of removal, pursuant to the procedures set forth in *Jackson* v. *American Savings Mortgage Corp.*, 924 F.2d 195 (11th Cir. 1991).

The district court held the Rule 59 motion timely, but denied it without considering it on its merits, reasoning that a district court "is not an appellate court and is unwilling to act as such." Pet. App. 3. Petitioners then appealed the underlying state court judgment to the Eleventh Circuit Court of Appeals. The RTC cross-appealed the district court's ruling that the petitioners' Rule 59 motion was timely and that court's refusal to consider the petitioners' motion on its merits. The RTC argued that, in both

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[2] The RTC terminated by operation of law on December 31, 1995. The FDIC succeeded the RTC by statute on that date as receiver for Hansen Savings Bank, SLA. 12 U.S.C. 1441a(m)(1).

instances, the post judgment removal procedures previously established by the Eleventh Circuit in *Jackson*—a case on which petitioners had relied in their remand motion—had been violated. Pet. App. 7.

3. The court of appeals held that the district court failed to follow the procedures set forth in *Jackson* by refusing to consider that motion on its merits if it was timely, Pet. App. 9-11, and by erroneously concluding that the petitioners' Rule 59 motion was timely filed, Pet. App. 11-13. The court of appeals stated that, in *Jackson*, it had noted that its role was "to review the actions of federal district courts, not to exercise appellate jurisdiction over state court proceedings." Pet. App. 8. Therefore, *Jackson* had established a procedure whereby, if an appealable order was pending in the state court case at the time it was removed, the party aggrieved by the order should move in federal district court to have it vacated or modified. In that way, "the fiction that the state court judge's acts were the acts of the district judge will have been converted into reality," *Ibid.* (quoting *Jackson*, 924 F.2d at 199), and, if the district court denies relief, the issue will be properly posed for resolution by the court of appeals. The court also noted that in *Jackson* it had set a time limit for the aggrieved party's motion. The court had "stated that, pursuant to Rule 59(b) and (e): 'The district judge should give a dissatisfied party ten days from the removal date to file the motion.'" Pet. App. 9 (quoting *Jackson*, 924 F.2d at 199 n.9).

The court of appeals concluded:

> Thus, *Jackson* mandates that before this Court will review a state court order or judgment in a case that has been removed to federal court, the

> party seeking appeal must first file a Rule 59 motion to modify or vacate the judgment in the district court. Moreover, the motion must be filed within ten days from the date of removal of the case to federal court. If this procedure is complied with, the district court is to consider and decide all issues raised in the Rule 59 motion, and the dissatisfied party may then appeal the district court's decision to this Court. We will review the district court's decision to grant or deny the Rule 59 motion, not the underlying state court judgment per se.

Pet. App. 9.

The court of appeals affirmed the district court's denial of petitioners' Rule 59 motion on the grounds that the motion was untimely filed and petitioners' right to appellate review of the underlying state court judgment was thereby waived.

ARGUMENT

The court of appeals correctly applied *Jackson* to hold that petitioners had waived their right to appellate review of the underlying state court judgment. Petitioners did not file their Rule 59 motion until September 29, 1992, 167 days after the RTC removed the action to federal court. The procedures governing review of actions removed in this posture were clearly set forth by the Eleventh Circuit in *Jackson*, and the district court and court of appeals were bound to follow them.

1. Petitioners argue (Pet. 7) that the court of appeals erred in applying *Jackson* because it "took precatory language" from the *Jackson* decision "and created a hidden jurisdictional deadline" requiring them to file a Rule 59 motion within ten days of the

RTC's removal in order to preserve their right to appellate review. Petitioners further argue that application of this "new" rule in their case was "retroactive" and contrary to due process.

Petitioners' argument (Pet. 5) that nothing in the *Jackson* opinion "required or gave reasonable notice" of the ten-day rule is inconsistent with the plain language of that opinion. The entire focus of the *Jackson* decision was the determination and announcement of the procedures to be followed in reviewing cases removed in this posture. The requirement to file a motion to alter or amend the state court judgment is set forth in the text of the opinion as well as in footnote 9. See 924 F.2d at 199 & n.9. The footnote indicates that the motion should be filed within ten days of the removal, the time limit under Federal Rule of Civil Procedure 59 for filing a motion for a new trial or a motion to alter or amend the judgment. Much of the opinion is devoted to explaining the rationale for adopting those procedures. The *Jackson* court made it clear in its opinion it was establishing the procedural rules that should henceforth be followed by the district courts and the parties in cases of this type in the Eleventh Circuit.

Petitioners argue (Pet. 4) that the *Jackson* rule was "dictum," presumably because the Eleventh Circuit, consistent with its concern for applying a new procedural ruling retroactively to a party that had no opportunity to learn of it in advance, declined to apply the ten-day rule to the appellant in that case. See 924 F. 2d at 199. Regardless of whether the *Jackson* rule could be formally characterized as "dictum" for that reason, however, the Eleventh Circuit in *Jackson* made clear that it was making a considered legal ruling that would be applied in future cases in which

the parties had fair opportunity to learn of it and comply with it. See Pet. App. 12. The Eleventh Circuit has so understood *Jackson* in at least two other cases.[3] District courts in the Eleventh Circuit have also similarly understood the import of *Jackson*'s ten-day rule and have applied it against both private parties and the RTC.[4]

Contrary to petitioners' contention (Pet. 8-10), application of the *Jackson* rule in the instant case was not retroactive. *Jackson* was decided on February 19, 1991, more than a year before the RTC filed its notice of removal on April 15, 1992. The court of appeals noted that it would be "reluctant to apply the *Jackson* ten-day rule to [petitioners] if their failure to comply with it had occurred before that decision was announced." 51 F.3d at 246. But, the court held, in light of the fact that *Jackson* was decided more than one

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[3] See *Bakery Centre Ass'n* v. *Orientations Gallery, Inc.*, 54 F.3d 688, 689 (11th Cir. 1995) ("Under *Jackson*, the exclusive procedure parties must follow upon the removal of a state appeal is the filing of a timely Rule 59(e) motion."); *Aguilar* v. *FDIC*, 63 F.3d 1059, 1061 n.1 (11th Cir. 1995) ("This [ten-day] rule was first set out in *Jackson*."). The Fourth Circuit in *RTC* v. *Allen*, 16 F.3d 568 (4th Cir. 1994), summarized the Eleventh Circuit's approach as "requir[ing] that the party seeking appeal first file a motion in the district court to modify or vacate the order or judgment within ten days from the removal date." *Id.* at 572-573.

[4] See *Bakery Centre Ass'n*, 54 F.3d at 688 (affirming district court's ruling that appellant's right to appeal was waived by failure to file timely motion to vacate); *Summerchase Condominium Owners Ass'n, Inc.* v. *RTC*, 145 F.R.D. 583, 584 (S.D. Ala. 1993) (enforcing "[t]he *Jackson* requirement that an unsatisfied litigant file a Rule 59 motion within 10 days of removal in order to obtain review of a state court judgment" against the RTC, and dismissing the case).

year before the removal of this case, "it is not unfair to charge [petitioners] with knowledge of [*Jackson*] and the ten-day rule announced therein." 51 F.3d at 246.[5]

2. Petitioners also contend that the Eleventh Circuit's decision conflicts with decisions of the Third, Fourth and Fifth Circuits. Although other circuits have employed different procedural approaches when addressing removal following a state court trial decision,[6] all of those procedures permit

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[5] Petitioners cannot and do not claim that they were unaware of the existence of the *Jackson* decision. They themselves cited *Jackson* to the district court in support of their May 20, 1992, motion to remand (R. 3, at 6, Record Below), more than four months before they filed their untimely motion to vacate.

[6] The Fourth Circuit has adopted an approach whereby the district court must "immediately after removal * * * adopt the state court judgment as its own." *Resolution Trust Corp.* v. *Allen*, 16 F.3d 568, 573 (4th Cir. 1994). The parties then have the ordinary ten days to file motions for a new trial under Fed. R. Civ. P. 59, or the aggrieved party may file a notice of appeal under the ordinary time periods applicable under Fed. R. App. P. 4. *Ibid.* See also *Resolution Trust Corp.* v. *Bayside Developers*, 43 F.3d 1230, 1238 (9th Cir. 1995) (following same approach). In jurisdictions that do not have applicable precedent, the RTC and FDIC have advocated positions consistent with the Fourth Circuit's approach. The Third Circuit has held that in a case removed from a state court after judgment, parties should have thirty days to file Rule 59 motions, after which time "the district court should enter an order adopting the state court judgment as its own," from which an appeal may be taken. *Resolution Trust Corp.* v. *Nernberg*, 3 F.3d 62, 68 (3d Cir. 1993). The Fifth Circuit has adopted an approach requiring the district court "to take the state court judgment as it finds it, prepare the record as required for appeal, and forward the case to a federal appellate court for review." *In re Meyerland Co.*, 960 F.2d 512, 520 (5th Cir. 1992) (en banc), cert.

federal appellate review of the removed cases. As this Court has observed on numerous occasions, "[t]he Courts of Appeal have significant authority to fashion rules to govern their own procedures." *Cardinal Chemical Co.* v. *Morton Int'l, Inc.*, 113 S.Ct. 1967, 1976 (1993). Federal Rule of Appellate Procedure 47 specifically authorizes the courts of appeal to "regulate their practice in any manner not inconsistent with these rules." The fact that the circuits have different approaches to address the procedural effects of removal of a case after an appealable order has been issued by the state court, therefore, does not create a conflict in the circuits that requires this court's resolution. Local procedural rules adopted by the circuits may differ, so long as they adequately protect the parties' substantive legal rights.

In *Thomas* v. *Arn*, 474 U.S. 140 (1985), this Court held that a rule promulgated by the Sixth Circuit conditioning the right to appeal a district court's order upon the filing of timely objections to the magistrate's report and recommendation was within the court's supervisory powers and violated neither the Federal Magistrates Act nor Article III of the Constitution. The Court affirmed the Sixth Circuit's ruling that the petitioner had lost her right to appeal the district court's order denying habeas corpus relief by failing to file objections to the magistrate's report and recommendation within ten days. Although different procedural approaches had been

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denied, 506 U.S. 1049 (1993); accord *In re 5300 Memorial Investors, Ltd.*, 973 F.2d 1160, 1162-1163 (5th Cir. 1992); *Walker* v. *FDIC*, 970 F.2d 114, 119-120 (5th Cir. 1992). Under the Fifth Circuit's approach, it appears that the parties have no opportunity to challenge the state court's judgment in federal district court.

taken by various circuits, the Court determined that they were all legitimate exercises of the courts' supervisory powers because they were procedural rules and not "restrict[ions] on the court's own jurisdiction." *Id.* at 146-147. The Court further held that the Sixth Circuit's rule did not violate due process because the petitioner's right to appeal was not denied, "it was merely conditioned upon the filing of a piece of paper * * * [and]' the State certainly accords due process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule.'" *Id.* at 155.

The same reasoning applies here. The *Jackson* rule requires that the parties articulate to the district court their specific challenge to the underlying state court judgment, together with any federal issues arising in connection with the substitution of the RTC as a party to the action in place of the failed financial institution. The *Jackson* procedure also provides an opportunity for the district court to conduct additional proceedings and take new evidence, if appropriate. The procedure is not inconsistent with any constitutional or statutory provision. See *Thomas*, 474 U.S. at 148-155. Where, as here, the rule has been set out clearly in a published decision, there is no trap for the unwary; so long as a litigant follows the procedures adopted by the Eleventh Circuit, appellate review is preserved.[7]

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[7] The issues addressed by the Eleventh Circuit's *Jackson* rule arise only when a case is removed from state court after a state trial court judgment. That situation has not arisen frequently; as a practical matter, it arises only when a financial institution that is a party to a state court case fails and a federal receiver or conservator with removal powers is appointed after the state trial court has issued a judgment. See,

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

WILLIAM F. KROENER, III
General Counsel

ANN S. DUROSS
Assistant General Counsel

THOMAS L. HINDES
Senior Counsel

SHEILA KRAFT BUDOFF
Counsel
Federal Deposit Insurance Corporation

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e.g., 12 U.S.C. 1441a(*l*)(3)(A); 12 U.S.C. 1819(b)(2)(B). Because of the decline in the number of failures of banks and thrift institutions in recent years—and therefore in the number of instances when a federal receiver is appointed—that situation is becoming even rarer. See Federal Deposit Insurance Corp., *1994 Annual Report* 125 (steady decline of FDIC-insured banks closed because of financial difficulties from 200 each in 1988 and 1989 to 13 in 1994); Resolution Trust Corp., Office of Planning, Research, and Statistics, *Statistical Abstract August 1989/ September 1995*, at 9 (steady decline in number of institutions taken over by RTC from 313 in 1989 to 2 in 1995).